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No. 83-781

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1983

TIMOTHY TILTON, Et Al. - - - Petitioners

versus

JEFFERSON COUNTY BOARD OF EDUCATION, Et Al. - - - - - Respondents

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

PAGE

Table of Authorities ..... ii–iii

Introduction 1– 2

Counterstatement of the Case 2– 6

Summary of Argument 6– 7

Argument 7–15

I. This Case Is Moot 7–10

II. There Is No Conflict Between the Decision of the Sixth Circuit and Any Decision of Any Other Federal Court of Appeals 10–12

III. There Is No Conflict Between the Decision of the Sixth Circuit and Any Decision of This Court. 13–15

Conclusion 15–16

Proof of Service 17

Appendix A—(Affidavit of Billie Downing).....19–23

Appendix B—(Affidavit of Mildred Payne) 24–25

Appendix C—(Affidavit of Elaine Kasian).....26–27

Appendix D—(Affidavit of Edgar Dyer).....28–29

TABLE OF AUTHORITIES

Cases: PAGE

Board of Education v. *Rowley*, 458 U. S. 176 (1982) 7, 13, 14, 15
Bright v. *Nunn*, 448 F. 2d 245 (6th Cir. 1971) 2
Crawford v. *Pittman*, 708 F. 2d 1028 (5th Cir. 1983) 10, 12
DeFunis v. *Odegaard*, 416 U. S. 312 (1974) 7, 8
Dunn v. *Blumstein*, 405 U. S. 330 (1972) 8
Epperson v. *Arkansas*, 393 U. S. 97 (1968) 7, 14
Fallis v. *Ambach*, 710 F. 2d 49 (2d Cir. 1983) 7, 10, 11
Garcia v. *Rush-Presbyterian-St. Luke's Medical Center*, 80 F.R.D. 254 (N.D. Ill. 1978) 2
Martinez v. *Bynum*, 103 S. Ct. 1838 (1983) 14
Milikan v. *Bradley*, 418 U. S. 717 (1974) 14
Murphy v. *Hunt*, 455 U. S. 478 (1982) 7
North Carolina v. *Rice*, 404 U. S. 244 (1971) 7
O'Shea v. *Littleton*, 414 U. S. 488 (1974) 9
Penhurst State School and Hospital v. *Halderman*, 451 U. S. 1 (1981) 13
Plyler v. *Doe*, 457 U. S. 202 (1982) 14
Powell v. *McCormack*, 395 U. S. 486 (1969) 7
Rice v. *Sioux City Cemetery*, 349 U. S. 70 (1955) 16
Sonsa v. *Iowa*, 419 U. S. 339 (1975) 9
St. Pierre v. *United States*, 319 U. S. 41 (1943) 7
United States v. *Alaska S.S Co.*, 253 U. S. 113, (1920) 7
United States Parole Commission v. *Geraghty*, 445 U. S. 388 (1980) 9
Weinstein v. *Bradford*, 423 U. S. 147 (1975) 8

Statutes:

20 U.S.C. §1401 *et seq.* 3
20 U.S.C. §1401(19) 4, 5
20 U.S.C. §1412(1) 3
20 U.S.C. §1415(b)(2) 5

PAGE

20 U.S.C. §1415(e)(3) 7, 11, 13, 15
29 U.S.C. §794 5
Pub. L. 94-142 3
KRS 156.010 3
KRS 158.135 4
KRS 160.160 3
KRS 160.290 3
KRS 194.010 3

Miscellaneous:

United States Constitution, Article III 7
Fed. R. Civ. P. 25(d) 2
U. S. Supreme Court Rule 17.1 16
U. S. Supreme Court Rule 19.3 2

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JEFFERSON COUNTY BOARD OF EDUCATION, Et Al. - - - *Respondents*

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

INTRODUCTION

The Respondents[1] respectfully submit this brief in opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit (the "Petition") filed on behalf of Timothy

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[1]The Respondents named in the Petition are the three government agencies and the 14 individual officers and employees of those agencies who were named as Defendants in the Complaint [*See* Petition, App. D, pp. 34-35]. Each counsel for the respective Respondents represents one of the agency Respondents and the officers and employees of that Respondent. Since the time the Complaint was filed, eight of the 14 individuals named in the Complaint have been replaced by their duly elected or appointed successors. Additional changes in these offices and positions will probably occur before this Court reaches a decision on the Petition. Because the allegations of the Complaint are directed primarily toward the three agency respondents, counsel for the Respondents have not sought an order of substitution with respect to each new

(Footnote continued on following page)

Tilton, Robert McDaniel and Del Shawn Morris by their parents and guardians (the "Petitioners").[2]

COUNTERSTATEMENT OF THE CASE

The Respondents submit this counterstatement of the case to supply certain relevant facts omitted from, or insufficiently explained in, the Petition.

This is an action in which the Petitioners, the parents and guardians of three emotionally disturbed children (the "Children"), claimed that their and the Childrens' rights[3] were violated by the Kentucky Cabinet for Human Resources and its Secretary (collectively, "KCHR"), the Kentucky Department of Education, its Superintendent and certain of its employees (collectively, "KDOE"), and the Board of Education of Jefferson County, Kentucky, its Superintendent and certain of its employees (collectively,

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(Footnote continued from preceding page)
officer and employee, and do not intend to do so in the future. See, Fed. R. Civ. P. 25(d).

[2]As of date this brief was printed, counsel for the Petitioners have not notified the Respondents of the date of filing of the Petition and docket number of the case, as required by U. S. Supreme Court Rule 19.3.

[3]The Petitioners also claimed in the Complaint that they represented a class of similarly situated persons. Because the District Court properly dismissed the Complaint after the hearing on Petitioners' motion for preliminary injunction [*see, Bright* v. *Nunn*, 448 F. 2d 245, 247, n.1 (6th Cir. 1971)], the District Court did not reach the issue of class certification. *See, Garcia* v. *Rush-Presbyterian-St. Luke's Medical Center*, 80 F.R.D. 254, 260 (N.D. Ill. 1978). Contrary to the statements at page 5 of the Petition, the District Court denied the motion for temporary restraining order on May 28, 1981, and heard the motion for preliminary injunction on June 3 and 4, 1981.

the "Board").[4] The event which gave rise to this alleged violation of rights was KCHR's decision to close the Jewel Manor Day Treatment Center ("Jewel Manor"), a day residential facility funded and operated by KCHR in Jefferson County, Kentucky to provide treatment for children with behavioral disorders.

At the time the Complaint was filed, the Children were receiving treatment from KCHR at Jewel Manor on a daily basis. Because the Children were classified as "handicapped" under the Education of the Handicapped Act, 20 U.S.C. §1401 *et seq.*, as amended by the Education for All Handicapped Children Act of 1975, Pub. L. 94-142 (the "Act"), they were entitled by the Act to receive a "free appropriate public education" from the state of Kentucky. 20 U.S.C. §1412(1). Because the Children were present at Jewel Manor each day, they were unable to receive that education at any of the schools maintained by the Board. Therefore, KCHR, by contract with the Board, provided educational instruction to the Children and other residents of Jewel Manor[5] on the Jewel Manor prem-

[4]KCHR is a department of Kentucky state government with broad responsibilities in the area of health and social welfare. *See*, KRS 194.010. KDOE is a department of Kentucky state government with general supervisory authority over public education in Kentucky. *See*, KRS 156.010. The Board is a local board of education established under Kentucky law to provide public education in Jefferson County, Kentucky. *See*, KRS 160.160 and 160.290.

[5]The Petitioners' evidence in the District Court established that as of May, 1981, KCHR was providing treatment to 47 emotionally disturbed children at Jewel Manor, and that 18 of those children would not have been in day residence at Jewel Manor by the time the 1981-82 school year began because of improvement in their condition.

ises, as appropriate within the context of their treatment plans. The Board was reimbursed for these services from KDOE under KRS 158.135, a Kentucky statute that provides funding for school services provided by a local board of education to children in a state-operated day treatment center such as Jewel Manor.

Because the Children were in residence at Jewel Manor daily, the Individualized Educational Program ("IEP") prepared for each of the Children under 20 U.S.C. §1401(19) stated that they would be educated there. Jewel Manor was, however, a KCHR treatment facility, not an educational institution. The Petitioners' evidence in the District Court established that emotionally disturbed children were placed into KCHR's program at Jewel Manor primarily to deal with their behavioral problems, not to provide the education to which they were entitled under the Act. The District Court found that:

> Plaintiffs' evidence showed that Jewell [sic] Manor is a restrictive facility, the primary purpose of which is the treatment of emotionally disturbed children. Its goal is to improve the children to a point at which they are able to cope with the educational process. Concomitant with the treatment, the youngsters receive schooling from teachers employed by the defendant, the Jefferson County Board of Education [Petition, App. C, p. 32].

KCHR closed Jewel Manor for budgetary reasons on May 29, 1981. Because the Children would no longer receive daily treatment on the Jewel Manor

premises, the Board could provide specialized educational services to the Children during the 1981-82 school year in the programs for emotionally disturbed children conducted at the Board's own facilities. At conferences held under 20 U.S.C. §1401(19) prior to May 29, 1981, the Board proposed to the Petitioners new IEPs which provided that each of the Children would receive these services during that school year at one of these facilities.

Initially, the Petitioners rejected the Board's proposals for the 1981-1982 school year. In addition to filing this action under the Act[6] for a temporary restraining order and preliminary injunction to require KCHR to continue to operate Jewel Manor, the Petitioner Morris and two other parents demanded administrative hearings under 20 U.S.C. §1415(b)(2). Those hearings were not vigorously pursued by the parents. KDOE cancelled one of the hearings in July, 1981, at the request of the parents. KDOE notified the other parents in January, 1982, that it considered the remaining hearing requests to be cancelled, due to lack of response by the parents and their representatives to notices from KDOE. There have been no further contacts from these parents or their representatives, and

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[6]In their Complaint, the Petitioners also claimed violations of Section 504 of the Rehabilitation Act of 1973 [29 U.S.C. §794], the Due Process and Equal Protection clauses of the United States Constitution, the Kentucky Constitution and various Kentucky statutes. On appeal to the Sixth Circuit, and in their Petition, the Petitioners have sought review only with respect to their alleged claims under the Act. *See*, footnote 1 to the Sixth Circuit's Opinion [Petition, App. A, p. 21].

there are no pending hearing requests from any other children who attended Jewel Manor prior to its closing [*See,* Affidavit of Billie Downing, App. A].

The Children attended special education programs at the Board's facilities during the 1981-82 school year. In 1982 and 1983, the Children received new IEPs for the 1982-83 and 1983-84 school years, and the Petitioners have not contested those IEPs. Robert McDaniel is currently attending a special education school operated by the Board, Timothy Tilton is attending special education classes in a regular school operated by the Board, and Del Shawn Morris is attending a combination of special and regular classes in a regular school operated by the Board. The Petitioner Morris has requested that Del Shawn's IEP be reviewed again in January, 1984, because she wants Del Shawn to attend only regular classes beginning January, 1984 if possible [*See,* Affidavits of Mildred Payne, Elaine Kasian and Edgar Dyer, Apps. B. C and D].

SUMMARY OF ARGUMENT

1. This case is moot because each of the three Petitioners has accepted without further protest the alternate special education program offered by the Board for the Children during the 1981-82 and 1982-83 school years, and in the absence of a certified class there is no issue capable of repetition that would otherwise evade review.

2. The decision of the Sixth Circuit is not in conflict with any decision of any other Federal Court of Appeals with respect to the questions presented by the Petition. Indeed, the decision of the Sixth Circuit

was recently followed by the Second Circuit in a similar case, *Fallis* v. *Ambach*, 710 F. 2d 49 (2nd Cir. 1983).

3. The decision of the Sixth Circuit is not in conflict with any decision of this Court. Indeed, the decision of the Sixth Circuit is completely consistent with this Court's only decision construing the Act, *Board of Education* v. *Rowley*, 458 U. S. 176 (1982). The Sixth Circuit correctly held in reliance on *Rowley*, as well as *Epperson* v. *Arkansas*, 393 U. S. 97 (1968), that 20 U.S.C. §1415(e)(3) does not apply when a program is discontinued or a facility is closed for purely budgetary reasons.

ARGUMENT

I. This Case Is Moot.

It is a familiar proposition that "federal courts are without power to decide questions that cannot affect the rights of the litigants in the case before them." *North Carolina* v. *Rice*, 404 U. S. 244, 246 (1971). This Court hears only actual cases and controversies between adverse interests and does not review those cases which are moot. United States Constitution, Article III; *United States* v. *Alaska S. S. Co.*, 253 U. S. 113, 116 (1920); *St. Pierre* v. *United States*, 319 U. S. 41, 42 (1943). A case becomes moot "when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome". *Murphy* v. *Hunt*, 455 U. S. 478 (1982). When the controversy becomes academic by reason of changed circumstances, this Court's jurisdiction ceases. *Powell* v. *McCormack*, 395 U. S. 486, 496 (1969). *DeFunis* v. *Odegaard*, 416 U. S. 312 (1974).

While this Court has recognized an exception to the general rule in cases that are "capable of repetition, yet evading review," this exception arises primarily in the narrow context of a class action suit. A class action may be permitted to proceed to adjudication on behalf of the class members even though the named plaintiff no longer retains a personal stake in the outcome. *See, Dunn* v. *Blumstein,* 405 U. S. 330 (1972). However, this Court has been quite firm in limiting this exception to suits brought in the form of a *properly certified* class action. In *DeFunis, supra,* in which the plaintiff challenged a law school minority admissions program as discriminatory and was admitted to the school during the pendency of the suit, this Court held that the plaintiff lacked the necessary adversarial posture to save the case from mootness. Significantly, this Court found it of great relevance that the plaintiff did not bring the case as a class action and, consequently, did not fit within the narrow "capable of repetition, yet evading review" exception. *DeFunis* at 319. *See also, Weinstein* v. *Bradford,* 423 U. S. 147 (1975) (plaintiff's claim against state parole board was rendered moot due to his intervening parole and the absence of a certified class in whose name the action could proceed).

A named plaintiff in a class action must show that the threat of injury in a case is real and immediate, not "conjectural" or "hypothetical." "Moreover, if none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of

himself or any other member of the class." *O'Shea* v. *Littleton*, 414 U. S. 488, 494 (1974). In *Sosna* v. *Iowa*, 419 U. S. 393, 403 (1975), this Court said unequivocally that:

> . . . the judicial power of Article III Courts extends only to "cases and controversies" specified in that Article. There must not only be a named plaintiff who has such a case or controversy at the time the complaint is filed, and at the time the class action is certified by the District Court . . . , but there must be a live controversy at the time this Court reviews the case (footnotes omitted).

This Court recently said that "a named plaintiff whose claim expires may not continue to press the appeal on the merits until a class has been properly certified." *United States Parole Commission* v. *Geraghty*, 445 U. S. 388, 404 (1980). Inasmuch as this case was never certified as a class action (*see*, footnote 3, *supra*), the only claims before this Court are the claims of the three Children, and those claims have been rendered moot by the failure of the Petitioner Morris to pursue the administrative hearing she commenced with respect to her son's 1981-82 IEP and the failure of all of the Petitioners even to demand due process hearings with respect to the 1982-83 and 1983-84 IEPs. Each of the three Petitioners has accepted without further protest the current IEPs recommended for the Children by the Board. Indeed, the Petitioner Morris has requested that her son be considered for removal from special education classes beginning January, 1984 [*See*, Affidavits of Billie

Downing, Mildred Payne, Elaine Kasian and Edgar Dyer, Apps. A, B, C and D]. Therefore, the issues presented by the closing of Jewel Manor are no longer live and the Petitioners lack a legally cognizable interest in the outcome.

II. There Is No Conflict Between the Decision of the Sixth Circuit and Any Decision of Any Other Federal Court of Appeals.

The Petition incorrectly states that there is a conflict among the Federal Courts of Appeals with respect to the questions presented by the Petition. To the contrary, the decision of the Sixth Circuit in this case is completely consistent with, and was relied upon in, the decision of the Second Circuit in a similar case, *Fallis* v. *Ambach,* 710 F. 2d 49, 56 (2d Cir. 1983). The decision of the Fifth Circuit in *Crawford* v. *Pittman,* 708 F. 2d 1028 (5th Cir. 1983). which is cited by the Petitioners, is not in conflict with the decision of either the Sixth Circuit or the Second Circuit.

The holdings in both this case and *Fallis* turn on a different issue than the one before the Fifth Circuit in *Crawford.* In this case and *Fallis,* the Circuit Courts addressed, in parallel fashion, the state and local educational agencies' ability to exercise discretion in implementing budgetary decisions. Both cases involved a state agency determination that there was an economic inability to fund a particular school at the current level. In this case, the KCHR closed Jewel Manor for budget reasons. Similarly, in *Fallis,* the New York State Department of Education sought to

reduce the rate at which local school districts were to reimburse a particular private school for providing handicapped children with a free, appropriate public education pursuant to the Act. The plaintiffs, the parents of several autistic children, sought to enjoin the rate reduction, arguing that the state agency could bring about the financial collapse of the school, effectively prompting a transfer of the handicapped children out of the school. Such a transfer, according to the plaintiffs, would be tantamount to a change in placement, thereby triggering the notice and hearing provisions of the Act. In holding for the defendants, the Second Circuit stated that the case did *not* present a case of immediate discharge but instead concerned the overall tuition reimbursement rate allowable with respect to a school. *Fallis,* at 55. Moreover, the Second Circuit stated that the case did not concern the State's obligation under 20 U.S.C. §1415 (e)(3) to maintain a child's current placement pending the selection of an alternative placement. Rather, it concerned the question of whether the State had an obligation to provide a certain funding level to an entire school to keep the school available for the placement of the plaintiffs' children. *Id.*, at 55.

In resolving the issue, the Second Circuit cited and relied on the Sixth Circuit's decision and rationale in this case, stating that the procedural safeguards of 20 U.S.C. §1415 were not meant to frustrate the fiscal policy of a State which elects to participate in the Federal program under the Act. Therefore, the plaintiffs could not use the automatic stay protection of the

Act to effectively supplant the reasoned judgment of the State in favor of their own penchants. The State was free to make decisions affecting the individual placement of a child within the existing program.

In contrast, the Fifth Circuit in *Crawford* confronted the distinct issue of the State and local educational agencies' ability to implement sweeping and inflexible policy mandates violative of the substantive requirements contained in the Act. Specifically, the record there indicated that the State categorically refused to consider special education programs that extended beyond 180 days. The Fifth Circuit held that the categorical limitations on the possible duration of the special education programs were inconsistent with the Act's insistence on IEPs formulated to meet the unique needs of each handicapped child. *Crawford,* at 1035. In so ruling, the Fifth Circuit merely required that the State not categorically initiate a wholesale policy which curtailed the children's ability to participate in a federally funded program altogether.

In light of this, it is evident that the decision in *Crawford* arises out of a wholly different factual context than the decision in either *Fallis* or this case and consequently rests on totally distinguishable legal grounds. Since these decisions are not at variance, there is no conflict between the decision of the Sixth Circuit and any decision of any other Federal Court of Appeals.

III. There Is No Conflict Between the Decision of the Sixth Circuit and Any Decision of this Court.

To date, the only decision of this Court construing the Act is *Board of Education* v. *Rowley,* 458 U. S. 176 (1982). This Court's decision in *Rowley* is completely consistent with, and was relied upon in, the decision of the Sixth Circuit in this case.

The Sixth Circuit held in this case that a change in educational placement does not in and of itself trigger, nor indeed warrant, the imposition of the procedural protections of 20 U.S.C. §1415, including the requirement imposed by 20 U.S.C. §1415 (e)(3) that the child remain in his or her "current educational placement" during the pendency of any proceeding brought under that statute. Any ruling to the contrary would effectively allow interested parties to utilize the injunctive procedure of 20 U.S.C. §1415 (e)(3) to frustrate the fiscal policy of participating states: "Nothing in the legislative history or the language of the Act implies a legislative intent to permit interested parties to utilize the automatic injunctive procedure of §1415 (e)(3) to frustrate the fiscal policy of participating states." *Tilton,* at 804.

The Sixth Circuit's decision is not, as alleged in the Petition, an infringement on the spending power of Congress. The Petitioners contend that this Court's decision in *Pennhurst State School and Hospital* v. *Halderman,* 451 U. S. 1 (1981), required the Sixth Circuit to hold that Jewel Manor could not be closed. The Petitioners understandably fail to disclose that this Court considered and rejected a similar argument

in *Rowley*. In that case, this Court held that Congress had not imposed on the states a limitless obligation to maximize each handicapped's child potential. This Court relied on "the fundamental proposition that Congress, when exercising its spending power, can impose no burden upon the States unless it does so unambiguously," and this Court therefore concluded that the Act imposes no such burden. *Rowley*, at n. 11 and 26. On the same reasoning, the Sixth Circuit correctly held that the Act does not impose on the states a limitless burden to continue operating a particular facility in the face of budgetary constraints.

Furthermore, as both this Court and the Sixth Circuit have recognized, "by and large, public education in our nation is committed to the control of the state and local authorities." *Tilton*, at 804 (citing *Epperson* v. *Arkansas*, 393 U. S. 97, 100 (1968)). This Court has reemphasized this holding in several recent cases:

> No single tradition in public education is more deeply rooted than local control over the operation of schools; local autonomy has long been thought essential both to the maintenance of community concern and support for public schools and to quality of the educational process.

Martinez v. *Bynum*, 103 S. Ct. 1838, 1843 (1983) (citing *Miliken* v. *Bradley*, 418 U. S. 717 (1974)). *See also, Plyler* v. *Doe*, 457 U. S. 202 (1982).

As this Court recognized in *Rowley*, Congress did *not* intend to take control of public education away from the state and local authorities. *Rowley*, at 713. Instead, decisions regarding placement are best left to

the state and local authorities, which are in a far better position to marshal the prevailing data, weigh the over-riding factors and ascertain the most beneficial course of action:

> Courts must be careful to avoid imposing their view on preferable educational methods upon the states. The primary responsibility for formulating the education to be accorded a handicapped child and for choosing the educational method most suitable to the child's needs was left by the Act to state and local educational agencies in cooperation with the parents or guardian of the child. *Rowley,* at 712-13.

This Court went on to add that once a federal court determines that the requirements of the Act have been met, questions of methodology are for resolution by the states. Consequently, this Court held in *Rowley* that the choice of educational methods most suited to the child's needs is left by the Act to the State and local agencies. The Sixth Circuit, in view of *Rowley* and relying on this Court's reasoning in other cases, held that an interested party may not invoke the procedural injunction of §1415 (e)(3) to challenge a state or local agency budgetary determination. Therefore, there is no conflict between the decision of the Sixth Circuit and any decision of this Court.

CONCLUSION

The Petition does not present any questions that warrant review by this Court, and there are no "special and important reasons" for this Court to issue a

writ of certiorari to review those questions.[7] *Rice v. Sioux City Cemetery*, 349 U. S. 70, 77 (1955); U. S. Supreme Court Rule 17.1. The Petition should, therefore, be denied.

Respectfully submitted,

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[7]The Sixth Circuit's rejection of the facts and rationale of the District Court's decision does, however, present significant questions with respect to the construction of the Act. These questions are discussed in the Cross-Petition for a Writ of Certiorari filed by the Respondents contemporaneously with this Brief. In the event this Court decides to review the questions presented by the Petition, it should also review the questions presented by the Cross-Petition.

PROOF OF SERVICE

I, Dan C. McCubbin, one of the counsel of record for the Respondents, having been admitted to practice before the Supreme Court of the United States, do hereby certify that three (3) copies of this Brief were mailed, first class mail, postage prepaid, to Geneva Faye Parris and David Alan Friedman, Counsel for the Petitioners, Legal Aid Society, Inc., 425 West Muhammad Ali Boulevard, Louisville, Kentucky 40202, this 29th day of November, 1983.

Dan C. McCubbin

DAN C. MCCUBBIN

APPENDIX

APPENDIX A

AFFIDAVIT

MRS. BILLIE DOWNING, being duly sworn, deposes and states as follows:

1. I am the Head of the Bureau of Education for Exceptional Children in the Kentucky Department of Education (KDOE).

2. In my capacity as Head of the Bureau of Education for Exceptional Children, I am knowledgeable of the administrative proceedings required under 20 U.S.C. §1415 (b)(2) and state that records of the Bureau show the following regarding children who attended the Jewel Manor Day Treatment Center in Jefferson County, Kentucky (Jewel Manor) prior to that facility being closed by the Department, now Cabinet, for Human Resources:

Re: Brian Benton Kelly

a) On May 26, 1981, a request for an impartial hearing on behalf of Brian Benton Kelly was received by the Bureau of Education for Exceptional Children. As per standard operating procedure a hearing officer, Dr. Cecilia Arbuckle, was assigned and parties were notified by letter dated May 27, 1981.

b) On June 9, 1981, the hearing officer, Dr. Arbuckle sent letters to the parties notifying them that the hearing was scheduled for June 19, 1981. The parents' representative, Maureen Fitzgerald, then wrote Dr. Arbuckle on June 15, 1981 requesting that the hearing be rescheduled for August 7, 1981 and that the 45 day timeline be appropriately extended. A similar request from Jefferson County Public Schools was sent to Dr. Arbuckle on June 16, 1981. In response to these re-

quests, Dr. Arbuckle, by letter dated June 17, 1981, postponed the hearing until August 7, 1981.

c) On July 28, 1981, Maureen Fitzgerald, the parents' representative, notified Dr. Arbuckle of the parents' wish to withdraw their request for an impartial hearing. A letter dated August 5, 1981 from the Bureau of Education for Exceptional Children to Ms. Fitzgerald acknowledged cancellation of the hearing.

d) The Bureau of Education for Exceptional Children has received no further contacts from the parents or the parents' representative, Ms. Fitzgerald, indicating any interest in pursuing the administrative remedies available through this Bureau.

Re: Michael Sowder

e) On June 3, 1981, a request for an impartial hearing on behalf of Michael Sowder was received by the Bureau of Education for Exceptional Children. As per standard operating procedure, a hearing officer, Dr. William E. Greenlee was assigned, and parties were notified of the assignment by letter dated June 4, 1981.

f) Deborah Knapp, Coordinator of Procedural Safeguards at that time, met with Judi Davis, parents' representative, on June 23, 1981. The purpose of that meeting was to review procedures relative to the conduction of due process hearings. Following this meeting, Ms. Knapp sent a letter dated June 25, 1981, offering any further technical assistance needed on procedures relative to the hearing process.

g) Judi Davis, parents' representative, by letter dated July 6, 1981 wrote Dr. Greenlee, the hearing officer, and requested an extension of the 45 day timeline in order to examine records, gather evidence, and prepare for the case. Dr. Greenlee responded with a July 10, 1981

letter approving her request, and extending the timeline to August 7, 1981.

h) Dr. Greenlee was next contacted regarding the hearing by a July 30, 1981 letter from Jefferson County Public Schools. The letter confirmed that August 27, 1981 had been set as the date of the hearing, and requested that the timeline be extended for an additional 45 days. Dr. Greenlee approved this second request for extension by letter dated August 4, 1981, and notified all parties of the scheduled date for the hearing.

i) On August 24-25, 1981, Judi Davis, parents' representative, and Dan McCubbin, district's representative, sent letters to Dr. Greenlee requesting postponement of the hearing scheduled for August 27, 1981. The letters indicated that the parties wished to attempt mediation to resolve the remaining issues of concern.

j) Since no further correspondence was received from the parties regarding rescheduling of the due process hearing, the Bureau of Education for Exceptional Children sent a letter to Mr. Davis clarifying the status of the case. The November 20, 1981 letter noted that previous extensions of the timelines had run out in September, and it would be necessary to contact the hearing officer to obtain a specific extension date in order to keep the case active.

k) No specific extension was obtained by Ms. Davis, therefore on January 9, 1982, another letter was sent. This letter indicated that since Ms. Davis had not requested a specific extension date in response to our request, the Bureau of Education for Exceptional Children was considering the hearing request cancelled.

l) The Bureau of Education for Exceptional Children has received no further contact from the parents or parents' representative, Ms. Davis, indicating any in-

terest in pursuing further the administrative remedies available through this Bureau.

Re: Del Shawn Morris

m) On June 2, 1981, a request for an impartial hearing on behalf of Del Shawn Morris was received by the Bureau of Education for Exceptional Children. As per standard operating procedure a hearing officer, Ms. Natalie Patterson, was assigned, and parties were notified of the assignment by letter dated June 4, 1981.

n) Deborah Knapp, Coordinator of Procedural Safeguards at that time, met with Judi Davis, parents' representative on June 23, 1981. The purpose of that meeting was to review procedures relative to the conduction of the process hearings. Following this meeting, Ms. Knapp sent a letter dated June 25, 1981 offering any further technical assistance needed on procedures relative to the hearing process.

o) Judi Davis, parents' representative, by letter dated July 2, 1981, wrote Ms. Patterson, the hearing officer, and requested an extension of the 45 day timeline, in order to examine records, gather evidence, and prepare for the case. Ms. Patterson responded with a July 7 letter approving her request.

p) On July 16, Ms. Patterson notified all parties by letter that a hearing date of August 14, 1981 had been selected. She was next contacted August 7, 1981 by the district's representative, Dan McCubbin, who stated that the parties had agreed to a temporary placement and wished to attempt mediation to resolve issues regarding related services and counseling. To this end, he and Ms. Davis, the parents' representative, both submitted a joint request for postponement of the August 14, 1981 hearing. A letter granting this request was sent August 11, 1981.

q) Since no further correspondence was received from the parties regarding rescheduling of the due process hearing, the Bureau of Education for Exceptional Children sent a letter to Ms. Davis clarifying the status of the case. The November 20, 1981 letter noted that previous extensions of the timelines had run out in September, and it would be necessary to contact the hearing officer to obtain a specific extension date in order to keep the case active.

r) No specific extension was obtained by Ms. Davis, therefore on January 8, 1982, another letter was sent. This letter indicated that since Ms. Davis had not requested a specific extension date in response to our request, the Bureau of Education for Exceptional Children was considering the hearing request cancelled.

s) The Bureau of Education for Exceptional Children has received no further contacts from the parents or the parents' representative, Ms. Davis, indicating any interest in pursuing further the administrative remedies available through this Bureau.

3. That at the present time, to the best of my knowledge, there are no administrative proceedings pending before the KDOE involving Timothy Tilton, Robert McDaniel, Del Shown Morris, or any other child who attended Jewel Manor.

Subscribed and sworn to before me by Billie R. Downing this 22nd day of November, 1983.

(s) Billie R. Downing
Billie R. Downing, Affiant

My commision expires: October 31, 1987
(s) Janet L. W. Cummins

APPENDIX B

AFFIDAVIT

MILDRED PAYNE, being duly sworn, deposes and says as follows:

1. I am a Regional Placement Specialist employed by the Board of Education of Jefferson County, Kentucky (the "Board"). I am the Chairperson of the Regional Admissions and Release Committee ("RARC") for Timothy Tilton.

2. Prior to January, 1983, Timothy was enrolled in a Behavior Disordered ("BD") program at Prestonia Environmental School, a special education school operated by the Board.

3. At a meeting of Timothy's RARC held on January 3, 1983, the RARC recommended that Timothy's placement be changed from the BD program at Prestonia Environmental to a Learning Disabilities ("LD") special class at Lowell Elementary School, a regular school operated by the Board. The rationale for this recommendation was input from the RARC members and verbal reports from school personnel and Timothy's grandmother, Mona Richards (who is Timothy's guardian).

4. Timothy's grandmother was present at the January 3, 1983 RARC meeting, and she signed the summary report of the meeting. Timothy's grandmother has not protested his placement at Lowell Elementary.

5. As of the date of this Affidavit, Timothy remains enrolled in the LD special class at Lowell Elementary. Based on reports from school personnel, he is making satisfactory progress in that program.

Dated: 11/18/83

(s) Mildred E. Payne
Mildred E. Payne

STATE OF KENTUCKY }
COUNTY OF JEFFERSON } SS:

The foregoing Affidavit was subscribed and sworn to before me, a notary public, by Mildred Payne on November 18, 1983.

(s) Georgiana Claycomb
Notary Public

My commission expires: 1-20-86

APPENDIX C

AFFIDAVIT

ELAINE KASIAN, being duly sworn, deposes and says as follows:

1. I am the Head Teacher of Prestonia Environmental School, a special education school operated by the Board of Education of Jefferson County, Kentucky (the "Board"). I am also the Chairperson of the School Based Admissions and Release Committee ("SBARC") for Robert McDaniel.

2. Robert's current Individual Education Program ("IEP") was adopted by his SBARC on October 3, 1983. Robert's IEP provides that he will remain enrolled in a Behavior Disordered ("BD") program at Prestonia Environmental. In this program, Robert receives special education classes, special transportation and individual counseling.

3. Robert's current IEP has not been protested by his grandmother, with whom he now lives, or by his mother.

4. As of the date of this Affidavit, Robert remains enrolled in the BD program at Prestonia Environmental. Based on reports from school personnel, Robert continues to meet the criteria for special school placement.

Dated: 11/18/83

(s) Elaine A. Kasian
Elaine Kasian

STATE OF KENTUCKY }
COUNTY OF JEFFERSON } SS:

The foregoing Affidavit was subscribed and sworn to before me, a notary public, by Elaine Kasian on November 18, 1983.

(s) Georgiana Claycomb
Notary Public

My commission expires: 1-20-86

APPENDIX D

AFFIDAVIT

EDGAR DYER, being duly sworn, deposes and says as follows:

1. I am a Counselor employed by the Board of Education of Jefferson County, Kentucky (the "Board"). I am the Chairperson of the School Based Admissions and Release Committee ("SBARC") for Del Shawn Morris.

2. At a meeting of Del Shawn's SBARC held on October 4, 1983, the SBARC recommended that Del Shawn continue in his present educational placement at Meyzeek Middle School, a regular school operated by the Board. In this placement, as provided in Del Shawn's Individual Education Program, he is enrolled in a Behavior Disordered ("BD") Resource Program for language arts, social studies and science, and is enrolled in regular classes with non-handicapped students for mathematics and two electives.

3. Del Shawn's mother, Regina Morris, attended the October 4, 1983 SBARC meeting, and she signed the summary report of the meeting. Mrs. Morris wanted to review Del Shawn's progress at the end of January, 1984. She wants Del Shawn in all regular classes in January, 1984, if possible. Normally, reviews are held once a year.

4. As of the date of this Affidavit, Del Shawn remains enrolled in the BD Resource Program at Meyzeek Middle. Based on reports from school personnel, he is making satisfactory progress in that program.

Dated: 11/18/83

(s) Edgar Dyer
Edgar Dyer

STATE OF KENTUCKY }
COUNTY OF JEFFERSON } SS:

The foregoing Affidavit was subscribed and sworn to before me, a notary public, by Edgar Dyer on November 18, 1983.

(s) Georgiana Claycomb
Notary Public

My commission expires: 1-20-86